

*In the Matter of Emanuel Amadi, Newark*

DOP Docket No. 2010-367

**(Civil Service Commission, decided April 28, 2010)**

The appeal of Emanuel Amadi, a Housing Development Analyst with the City of Newark, of his removal and resignation not in good standing, effective July 9, 2009, on charges, was heard by Administrative Law Judge Gail M. Cookson (ALJ), who rendered her initial decision on March 23, 2010. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 28, 2010, accepted and adopted the Findings of Fact as contained in the attached initial decision. However, the Commission did not adopt the ALJ's recommendation to modify the removal to a four-month suspension. Rather, the Commission upheld the removal.

## **DISCUSSION**

The appellant was removed on the charge of other sufficient cause, *i.e.*, absence without official leave, failure to follow leave of absence procedures, and violation of policy and procedures. He was also resigned not in good standing. Specifically, it was asserted that the appellant was scheduled to return from vacation but that he had been absent without authorized leave since May 19, 2009, that he failed to contact management and his immediate supervisor regarding any issues that may have hindered him from reporting to work as scheduled, and that the appellant was provided several options to request proper leave but he failed to respond. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ set forth that the appellant had been approved for vacation leave from April 20, 2009 through May 18, 2009. The appellant's vacation was to Owerri, Nigeria. However, the appellant did not return to his position until July 20, 2009. Rather, he testified that he became ill on May 10, 2009, was diagnosed with malaria, and was admitted to a hospital. The appellant stated that he called his supervisor, Ronald McEachin, a Senior Program Development Specialist, on May 18 and May 19, 2009 and left him a message that he was very ill and he would not be able to return to work on his scheduled date. He also stated that he was discharged from the hospital on June 16, 2009, but he was subsequently beaten and robbed which resulted in him being re-admitted to the hospital and ultimately discharged on July 17, 2009. The appellant recalled that he spoke to McEachin near the end of June 2009 and was advised to obtain medical documentation regarding his extended illness. In short, the appellant recalled

trying to reach McEachin about four times during his ordeal, but given the difficulty in contacting him from the Nigerian hospital, he relied on his wife to communicate with the appointing authority. Upon his return to work on July 20, 2009, the appellant discovered that he had been terminated from employment. The medical documentation provided by the appellant indicated that he was hospitalized from May 10, 2009 through June 16, 2009 for bronchial pneumonia and a beating by armed robbers caused his re-hospitalization on June 21, 2009. However, after the appellant was admitted to the hospital due to the assault, the medical documentation indicated that he had become ill in the hospital and was diagnosed with malaria and cholera infections.

Pauline Ndzie, the appellant's wife, testified that she left a message regarding the appellant's condition with McEachin on May 18, 2009 and spoke with him on May 19, 2009, who advised her to keep him up-to-date. She stated that she called McEachin several times during this period and mentioned that the appellant's ticket had expired and that she would need to re-book a flight home for him. The ALJ noted that the record indicated Ndzie made the initial travel plans for the appellant on April 7, 2009 and that they encompassed a departure on April 21, 2009 and a return on June 19, 2009. Ndzie also testified that she had never received any written correspondence from the appointing authority during the appellant's absence and if she had seen mail from the appointing authority, the appellant would have told her to open it. Michael Meyer, Director of Housing and Real Estate, testified that he never directed McEachin to attempt to contact the appellant in Nigeria or to inquire into his emergency contact information. Rather, Meyer had "Abandonment of Employment" notices prepared and sent to the appellant's several addresses that were on file. However, Meyer had not seen any green card receipts or other evidence of actual delivery of the notices. Meyer also noted that personnel information on the appellant indicated that he had overstayed a prior visit to Nigeria in 2007. In that matter, the appellant was approved for vacation from April 9, 2007 to April 27, 2007, but utilized sick time from April 30, 2007 to May 11, 2007 because he had contracted typhoid fever and was admitted to a hospital. Although the appellant had provided a doctor's note for that incident, Meyer considered the current incident a pattern of practice by the appellant buttressed by the 2007 vacation overstay.

The ALJ determined that the charge of abandonment of employment should be dismissed, finding that it was disingenuous for the appointing authority to issue disciplinary charges against the appellant during a period when it knew the appellant could not respond because he was in a Nigerian hospital. However, the ALJ found it hard to believe that the appellant did not plan to overstay his visit to Nigeria. In this regard, the ALJ did not find credible Ndzie's testimony that she always booked flights with an extended return date on the ticket so that if there was a change, a charge would not be made for an entirely new ticket. In conjunction with the vague medical evidence and the credible evidence that he was

assaulted, the ALJ concluded that the appellant planned the first period of overstay from May 18, 2009 through June 19, 2009. Therefore, the ALJ determined that the charges of failure to follow leave of absence policy or procedure and being absent without leave were sustained. However, notwithstanding his supervisor's suspicion that he may have had an unauthorized leave in 2007, since the appellant had no prior disciplinary history during his six-year tenure, the ALJ recommended that the removal be reversed and the appellant be suspended for four months.

In its exceptions to the ALJ's initial decision, the appointing authority argues that the ALJ's credibility determinations with respect to the testimony of the appellant and Ndzie should be rejected. It also argues that the ALJ erred in dismissing the charge of resignation not in good standing. Specifically, the appointing authority states that it is uncontested that the appellant planned to overstay his leave without authorization for more than five days. Moreover, it asserts that the ALJ erred in finding that the appellant's evidence regarding his claimed assault and ensuing medical condition established that he was unable to return to work beyond June 19, 2009. Finally, the appointing authority emphasizes that the appellant's willful action in his planning a later return date from Nigeria than he was authorized is sufficiently egregious to warrant his removal.

Upon an independent review of the record, the Commission agrees with the Findings of Fact of the ALJ and concludes that the appointing authority has met its burden of proof on the charges sustained by the ALJ. However, for the reasons set forth below, the Commission determines that the penalty of removal should be upheld.

The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999) ). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto*, *supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004).

In this case, the ALJ specifically found it more likely than not that the subject of Ndzie's communication with McEachin on June 22, 2009 was the appellant's assault. However, the ALJ specifically found Ndzie's testimony that she

always booked flights with an extended return date on the ticket not to be credible. The ALJ also noted that the appointing authority failed to produce any evidence supporting successful or even attempted delivery and/or receipt of any notice purporting to affect the appellant's employment rights. Thus, the ALJ properly dismissed the resignation not in good standing because there was not sufficient evidence in the record to establish that the appellant abandoned his position. However, there is sufficient evidence in the record to support the ALJ's credibility determinations and the Commission upholds the charges of absence without official leave, failure to follow leave of absence procedures, and violation of policy and procedures.

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 N.J.A.R. 2d (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007).

In this case, although the appellant does not have a prior disciplinary record, in conjunction with the fact that he has only been employed with the appointing authority for six years, the Commission finds that the appellant's failure to follow the leave of absence procedures and being absent without leave are sufficiently egregious and warrant his removal. Indeed, it is uncontested that the appellant's initial travel plans to Nigeria indicated a departure on April 21, 2009 and a return date of June 19, 2009. In other words, the appellant's flight home was initially booked for one month *after* the date he was supposed to return to work. Regardless of what occurred after June 19, 2009, there is no credible explanation for this booking other than the intent on the part of the appellant not to return to work on the date his approved vacation leave ended. As previously observed, some disciplinary infractions are so serious that a harsh penalty is appropriate notwithstanding an employee's prior record. *See Carter, supra*. As noted by the ALJ, although there was credible evidence of an assault upon his person, the remainder of the medical evidence that he had initially utilized to justify his absence was vague at best. Accordingly, the Commission finds that the penalty

imposed by the appointing authority was neither unduly harsh nor disproportionate to the offense and should be upheld.

## **ORDER**

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. Therefore, the Commission upholds the action and dismisses the appeal of Emanuel Amadi.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.